

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ROY D. LOWHORN</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>GOODYEAR TIRE &amp; RUBBER CO.</b>	)	
Respondent	)	Docket Nos. 1,042,009
	)	1,042,941
	)	
AND	)	
	)	
<b>LIBERTY MUTUAL INSURANCE CO.</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent requested review of the August 4, 2010 Award by Administrative Law Judge (ALJ) Rebecca Sanders. The Board heard oral argument on November 9, 2010. E. Lee Kinch, of Wichita, Kansas, was assigned by the Acting Director to serve as a pro tem Board Member.<sup>1</sup>

**APPEARANCES**

John M. Ostrowski, of Topeka, Kansas, appeared for the claimant. John A. Bausch, of Topeka, Kansas, appeared for respondent and its insurance carrier (respondent).

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument the parties agreed that there is no dispute as to the compensability and ultimate functional impairment (28 percent) and work disability findings (50 percent) contained within the ALJ's Award in Docket No. 1,042,009. The sole issue in this appeal is respondent's entitlement to a retirement offset as provided in K.S.A. 44-501(h) against the

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<sup>1</sup> This assignment was made in light of the retirement of Board Member, Carol Foreman.

permanent partial disability compensation awarded in Docket No. 1,042,009. Accordingly, the findings and conclusions made in Docket No. 1,042,941 can be and hereby are summarily affirmed.

### ISSUES

The ALJ awarded claimant a 50 percent permanent partial general (work) disability pursuant to K.S.A. 44-510e(a). The Award made no provision for a retirement offset under K.S.A. 44-510(h) and this appeal followed. Before the Board *and for the first time in this record* respondent contends it is entitled to a weekly offset for the value of the retirement benefits claimant now receives. Accordingly, respondent asks the Board to modify the Award to take into account this weekly offset for those weeks claimant is paid for his 50 percent work disability (after his functional impairment has been fully paid out).

Claimant argues that respondent has wholly failed to meet its evidentiary burden to establish the source of the retirement funds it seeks to use as the basis for an offset. And its failure to meet that burden is fatal to its claim for an offset. Thus, the Award should be affirmed in its entirety.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The single issue to be addressed in this appeal is respondent's entitlement to an offset against claimant's work disability award. K.S.A. 44-501(h) provides:

If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

K.S.A. 44-501(h) provides for such an offset when the claimant is receiving retirement benefits where a plan is provided by the employer. Our courts have recognized that this offset is only available to respondent *to the extent that respondent contributes to*

*the private pension and even then no offset against the workers compensation benefits is allowed for the pension benefits attributable to an employee's contribution.*<sup>2</sup>

There is very little evidence within this record bearing upon the issue at hand. The only evidence relating to the source of claimant's retirement benefits came from claimant himself. That exchange reads as follows:

- Q. Okay. And your retirement from Goodyear, was that regular retirement?  
A. Yes sir.  
Q. And how much do you receive in retirement benefits?  
A. Approximately \$410 bridge and approximately around \$1,700 and something on my years times \$55.  
Q. So that you receive about 2,100?  
A. 2,200 in that vicinity counting the bridge.  
Q. 2,200 per month or week?  
A. Month. The 410 is a bridge.  
Q. And that started January, excuse me, July 1, 2009.  
A. Yes, I got my first check around the first of August.<sup>3</sup>

On the errata sheet, claimant provided more specific information as to the precise amounts of each check. But there was no further information offered as to the source of those funds.

This record does not explain what a 'bridge' payment is, who funds the 'bridge' payment, or the source of the contributions for the balance of the monthly payment. Indeed, at oral argument respondent's counsel conceded that he had no idea what a bridge payment was. And there is no testimony from respondent's representatives which sheds any light upon this issue. Respondent merely asserts that because claimant receives approximately \$2,100 per month in retirement, that monthly figure, when reduced to a weekly rate, yields a \$484.62 credit against claimant's work disability award.

It is significant, indeed problematic that this issue was not brought before the ALJ. The Board has scoured the record and concludes that the retirement offset issue was never presented to the ALJ for decision. At the Regular Hearing, the ALJ itemized the issues and even went so far as asking if the parties had any additional issues. Respondent's intention to ask for an offset is not mentioned at any point in those proceedings. Moreover, the Board was unable to find any submission brief to the ALJ by respondent which might have indicated respondent's intention on seeking such an offset. Admittedly, claimant made a passing reference in his submission brief to the ALJ indicating that the respondent *might* ask for an offset based upon claimant's retirement benefits, but the Board finds that fact alone did not raise or make that an issue ripe for a determination by the ALJ.

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<sup>2</sup> *Injured Workers of Kansas v. Franklin*, 262 Kan. 840,871, 942 P.2d 591 (1997).

<sup>3</sup> Claimant's Depo. (Mar. 11, 2010) at 58.

In a workers' compensation case, the burden of proof is on the claimant to establish the right to an award; once the claimant has met this burden, the respondent employer has the burden to demonstrate any exception.<sup>4</sup> This rule has specifically been applied to an employer's assertion that it is entitled to an offset for retirement benefits.<sup>5</sup>

The Board is limited under K.S.A. 2008 Supp. 44-551 to reviewing issues presented to and decided by an administrative law judge. Here, respondent never asserted it was entitled to an offset until *after* the ALJ had decided the claim. Consistent with its earlier decisions, the Board will not consider and indeed cannot consider this issue for the simple reason that respondent failed to make this an issue for the ALJ to decide. Respondent's belated appeal of this issue is, therefore, improper and must be dismissed.<sup>6</sup>

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Rebecca Sanders dated August 4, 2010, is affirmed in its entirety.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2010.

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BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

\_\_\_\_\_  
BOARD MEMBER

c John M. Ostrowski, Attorney for Claimant  
John A. Bausch, Attorney for Respondent and its Insurance Carrier  
Rebecca Sanders, Administrative Law Judge

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<sup>4</sup> *Rash v. Heartland Cement Co.*, 37 Kan. App. 2d 175, 154 P.3d 15 (2006).

<sup>5</sup> See *Rash v. Heartland Cement Co.*, Nos. 1,000,394 & 1,001,850, 2005 WL 1365145 (Kan. WCAB May 04, 2005).

<sup>6</sup> *Bergstrom v. Spears Manufacturing Company*, No. 1,009,142, 2009 WL 5385874 (Kan. WCAB Dec. 31, 2009).